BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN RE
REVIEW OF THE COMMISSION'S REGULATIONS GOVERNING PROGRAMMING PRACTICES OF BROADCAST TELEVISION NETWORKS AND AFFILIATES

MM Docket No. 95-92

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REPLY COMMENTS OF THE NETWORK AFFILIATED STATIONS ALLIANCE

WADE H. HARGROVE
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD
Post Office Box 1800
Raleigh, N.C. 27602
(919) 839-0300
Counsel for the ABC Television Network Affiliates Association

KURT A. WIMMER
CATHERINE J. DARGAN
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
(202) 662-6000
Counsel for the CBS Television Network Affiliates Association

WERNER K. HARTENBERGER
DOW, LOHNES & ALBERTSON
1255 23rd Street, N.W.
Washington, D.C. 20037
(202) 857-2630
Counsel for the NBC Television Network Affiliates Association

November 27, 1995

SUMMARY

The comments filed in response to the Notice of Proposed Rulemaking overwhelmingly supported preservation of the three core network-affiliate rules -- the right to reject, time option, and exclusive affiliation rules -- in their current form. Virtually all broadcast stations, representatives of nearly all affiliated and independent stations alike, agreed with the Network Affiliated Stations Alliance ("NASA") that these rules are necessary to ensure that licensees can fulfill their statutory duty to serve the public interest. Similarly, the new networks argued strenuously for the retention of the time option and exclusive affiliation rules without modification.

Only the three established networks -- ABC, CBS, and NBC -- favored modification of the core network-affiliation rules. Those networks persistently advocated total repeal of most, if not all, of the network-affiliate rules. This extreme view was supported by the established networks alone and was entirely unsupported by these broadcasters who are meant to be protected by the rules.

Affiliate and new network commentators demonstrated the necessity of the core network-affiliate rules to achieve the Commission's historical goals promoting competition, diversity of programming, and service to local communities. Affiliates suggested a reasonable approach that retains the core network-affiliate rules and modifies others as necessary to accommodate changing market conditions. Examples and factual data from affiliate groups and new networks reveal that substantial power in the network-

affiliate relationship remains with the networks. Many assumptions about network power vis-a-vis affiliates in the Notice and comments of the established networks are simply unsupported by the evidence, as these reply comments illustrate.

In these reply comments, NASA demonstrates that the arguments put forward by the three dominant networks in favor of eviscerating these core rules are based on rhetoric, not fact. The *NERA Study*, a solid piece of economic evidence, effectively deflates the networks' overextended and unsupported arguments. These reply comments summarize the economic facts underlying the network-affiliate relationship and reveal the baselessness of the networks' positions.

The established networks have employed various methods to hinder station autonomy and new network development, including implementing language in affiliation agreements that restrains independent station discretion in programming decisions. The core network-affiliate rules remain essential to the licensee's role as a "public trustee" and to the promotion of diverse, new programming. Already, under existing rules, the established networks have exerted tremendous power over their affiliates, resulting in gross limitations on station editorial discretion and decreased programming diversity.

To foster competition, diversity, and to enable licensees to satisfy their public interest obligations, the core network-affiliate rules must be retained in their current form.

Commentator	Supports FCC On Right to Reject Rule	Supports FCC On Time Option Rule	Supports FCC On Exclusive Affiliation	Supports FCC On Dual Network Rule	Supports FCC On Territorial Exclusivity Rule
Affiliate Groups/Supporters					
Network Affiliated Stations Alliance	No	No	No	Eventual reform will be in order	Yes, so long as existing agreements are not undermined
Association of Independent Television Stations, Inc.	No	No	No	FCC should defer consideration until advanced digital television is reviewed	Yes
Small Business Administration	No	No	No	Yes, after further investigation	Yes, after further investigation
Media Access Project	No	May be modified to allow time optioning by new networks	No	Yes	No
Chronicle Broadcasting Co.	No	No	No	--	--
Post-Newsweek Stations	No	No	No	--	--
LIN Television Corporation	No	No	No	--	--
Midwest Television, Inc.	No	No	No	--	--
The Providence Journal Co.	No	No	No	--	--
Spartan Communications	No	No	No	--	--
New World Television Inc.	--	--	--	Only if duopoly rule is eliminated	Yes
AFLAC Broadcast Group	No	FCC should defer consideration	FCC should defer consideration	FCC should defer consideration	FCC should defer consideration
Pappas Stations Partnership	No	No	No	Yes, if primary affiliate has first choice to affiliate with the new network	Yes
Lee Enterprises, Inc.	No	No	No	Agrees with NASA	Agrees with NASA
The New York Times Co.	No	No	Agrees with NASA	Agrees with NASA	Yes
Southern Broadcast Corporation of Saratsota	--	--	--	--	No, wants this rule strengthened
Sinclair Broadcast Group	No	No	No	No	--
Cosmos Broadcasting Corporation	No	No	No	No	Yes, 35-mile zone is a reasonable geographic area
Cox Broadcasting, Inc.	No	No	No	No	Yes, 35-mile zone is a reasonable geographic area

Commentator	Supports FCC On Right to Reject Rule	Supports FCC On Time Option Rule	Supports FCC On Exclusive Affiliation	Supports FCC On Dual Network Rule	Supports FCC On Territorial Exclusivity Rule
First Media Television, L.P.	No	No	No	No	Yes, 35-mile zone is a reasonable geographic area
Guy Gannett Communications	No	No	No	No	Yes, 35-mile zone is a reasonable geographic area
River City Broadcasting, L.P.	No	No	No	No	Yes, 35-mile zone is a reasonable geographic area
Great Trails Broadcasting	--	--	--	--	No
Holston Valley Broadcasting	No	No	No	No	Yes, so long as existing agreements are not undermined
Thomas C. Smith	--	--	No	Yes	No
Blade Communications, Inc.	No	No	No	No	Yes
New Networks/Supporters of New Networks					
The Warner Bros. Television Network	Yes	No	No	--	No
The United Paramount Network	--	May be modified to allow limited time optioning by emerging networks	No	--	--
Viacom, Inc	--	May be modified to allow time optioning only by new networks	No	FCC should defer consideration	--
Established Networks					
ABC	Yes	Yes, subject to a minimum notice period	Advocates total repeal	Advocates total repeal	Advocates total repeal or substantial modification
CBS	Yes, but rule should be further modified to prevent preemptions to broadcast local sporting events or entertainment programs	Advocates total repeal	Advocates total repeal	Advocates total repeal	Yes
NBC	Advocates total repeal of all network-affiliate rules	Advocates total repeal of all network-affiliate rules	Advocates total repeal of all network-affiliate rules	Advocates total repeal of all network-affiliate rules	Advocates total repeal of all network-affiliate rules

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REPLY COMMENTS OF THE NETWORK AFFILIATE STATIONS ALLIANCE

INTRODUCTION

The comments addressing the Commission's Notice of Proposed Rulemaking regarding the network-affiliate rules overwhelmingly favor retention of the core rules -- the right to reject rule, time option rule, and exclusive affiliation rule -- in their present form. Every broadcast organization filing comments -- the more than 600 ABC, NBC, and CBS affiliates represented by NASA; the approximately 115 independents and affiliates of the Fox, United Paramount Network and Warner Brothers Networks represented by the Association of Independent Television Stations ("INTV"); and the over twenty broadcasting organizations filing additional comments -- urged the Commission to reject the Notice's proposals.[1] The three established networks[2] stood alone in urging the Commission to eliminate the rules that safeguard the network-affiliate relationship.

NASA, INTV, and other station organizations have put forth a good faith effort in evaluating the network-affiliate rules to determine whether certain rules are nonessential and, therefore, may be modified or eliminated. The established networks, on the other hand, have quite predictably called for the most severe and revolutionary dismantling of the network-affiliate rules in their long history. Rather than analyze the rules in the context of the marketplace, the networks have simply demanded an across-the-board repeal. Significantly, the new networks undercut many assumptions made in the Notice about the decline of established networks as the dominant players in the market. The comments of UPN, Warner Brothers, and Viacom (which maintains a large interest in UPN) strongly support many of the arguments set forth in the affiliate comments.

NASA has not relied upon mere rhetoric in advocating retention of the rules. Instead, we have demonstrated, through the study conducted by the National Economic Research Associates, Inc., that affiliates have not gained power in relation to the networks since the reaffirmation of the network-affiliate rules by the Commission in 1980. *See* P. Beutel, H. Kitt & L. McLaughlin, *Broadcast Television Networks and Affiliates: Economic Conditions and Relationship — 1980 and Today* (1995) (attached to Comments of NASA).

Although most commenters supported the general concept of a reassessment of the rules governing the network-affiliate relationship, many cautioned that the "piecemeal"

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[1] *See* Summary of Comments Addressing the FCC's Proposal to Amend the Network-Affiliate Rule, Exhibit A.

[2] In this reply, the designation "established networks" refers to the three historically major networks -- ABC, CBS, and NBC. "Established networks" may also apply to the Fox Network, as the criticisms of the big three networks often apply equally to Fox, which has proven itself to be a significant competitor of those networks. The term "new networks" or "emerging networks" refers to the most recent entrants into the broadcast network industry, namely the United Paramount Network ("UPN") and the Warner Brothers Television Network ("WB").

approach to review disguised the real impact that this dismantling of safeguards protecting affiliates from network control has had on the balance of power in the network-affiliate relationship. Affiliates and new networks agree that the cumulative effect of this deregulation has been the consolidation of power in the new network-studio conglomerates to the detriment of station editorial discretion, viewer choice, diversity in programming, and competition among networks. The record in this docket establishes convincingly that changing the rules now would be a grave error.

ARGUMENT

I. COMMENTS REPRESENTING VIRTUALLY EVERY BROADCASTER IN THE COUNTRY OTHER THAN THE NETWORKS ESTABLISHED THAT NETWORKS CONTINUE TO HOLD THE UPPER HAND IN THE NETWORK-AFFILIATE RELATIONSHIP.

All of the commenters agreed that extraordinary technological advances in recent years have led to an increase in the number and types of participants in the video marketplace. Universal agreement, however, ends there.

The established networks and the Notice contend that such changes have increased affiliate power vis-a-vis networks, eliminating the need for many of the protections preventing network dominance of affiliates. The established networks argue that recent affiliation realignments and increased compensation to affiliates demonstrate that affiliates have gained tremendous power in their relations with networks in recent years.

NASA has demonstrated, and commenting broadcasters agree, that technological advances have not altered the network-affiliate relationship.[3] Additionally, recent

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[3] Several commentators note that network power in the network-affiliate relationship has not decreased as the result of revolutionary changes in the video marketplace. For example, New World Television, Inc. ("New World") points out that changes in the video marketplace have not altered the basic tension between networks and affiliates. Comments of New World at 3. In its comments, New World expressed concern that if bargaining power between networks and affiliates is tipped in favor of the networks, local programming

Commission deregulation in this area has solidified network power over affiliates.[4] The new networks agree that the established networks dominate the network-affiliate relationship -- often to the detriment of the new networks, as evidenced by anticompetitive provisions imposed in the established networks' affiliation agreements.[5]

A. A Wide Variety of Factors Demonstrates that Networks Continue to Dominate the Network-Affiliate Relationship.

1. The Increase in the Number of Stations and Networks

The *NERA Study* demonstrates that the increase in the number of both stations and networks in the past 15 years favors networks, not affiliates. For example, there are more markets today than in 1979 in which the number of stations exceed the number of networks. In local markets where there are more stations than networks, power tends to shift to the networks, as demonstrated by lower per television household network compensation to affiliates in those areas. *See NERA Study* at 3-5, 11, Tables 1 and 2.

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would be replaced by network programming in the most watched time periods. *Id.*

[4] *See* Comments of INTV at 6 ("The opportunity for a network to exert leverage over its affiliates . . . has been increased by the FCC"); Comments of Cosmos Broadcasting Corporation, Cox Broadcasting, Inc., First Media Television, L.P., Guy Gannett Communications, and River City Broadcasting, L.P. (the "Joint Parties") at 9 ("Recent and proposed regulatory and legislative changes have acted and will act to increase affiliates' dependence on networks and the networks' ability to exploit that dependence"); Comments of AFLAC Broadcast Group ("AFLAC") at 2 (noting that the cumulative effect of the recent statutory and regulatory changes now being contemplated by Congress and the Commission will "concentrate control over local programming in the hands of the national television networks"); Comments of Media Access Project ("MAP") at 2 ("with this proceeding the Commission once again dangerously rushes to deregulate rules which preserve the delicate balance of power between networks and their affiliated stations").

[5] *See* Comments of Viacom at 7 ("a number of recent reexaminations and repeals of Commission rules threaten further to increase the leverage of the established networks over their affiliates"); Comments of Warner Brothers Television Network at 3 ("[T]his is not the time to remove the safeguards the Commission provided to the earlier network entrants. Today's new networks -- The WB and UPN -- deserve the same chance that the other most recent beneficiaries of the rules (ABC and Fox) were given to compete in a market absent barriers imposed by the incumbent networks").

ABC asserts that the increase in both the number of independent stations and the availability of non-broadcast outlets is adequate to support the development and growth of new networks. Warner Brothers, however, noted in its comments that the "most frustrating task" in building its new network has been finding available stations with which to affiliate. UPN also notes that, although other video delivery services are now widely available, broadcast television remains the only free, universal source of local news and public interest programming. Approximately 35 million households, or 37.5% of Americans, receive all of their video services through free broadcast television. As UPN notes, the Commission historically has had an unwavering commitment to universal free access to video services.

In their comments, both new networks note that they are heavily dependent upon secondary affiliations for survival. Consequently, although there has been an increase in independent stations, that increase has not eliminated the need for new networks to enter into relationships with affiliates of the established networks.

2. The Value of Network Affiliation

Network affiliation continues to be the most attractive programming option for stations. Although there has been a slight increase in the number of markets with more stations than networks, there are *no* markets where stations have chosen to drop their affiliation to become independent. Network affiliation is valued as much today as it was in 1980 as measured by: (1) the relative profitability of affiliates vis-a-vis independent stations, (2) the extent to which stations forego affiliations, and (2) the local market viewer share of network affiliates in contrast to that of independent stations.[6]

Networks can and do threaten stations with the termination of network affiliation to coerce them into limiting preemptions of network programming. Numerous commenters

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[6] *See NERA Study* at 8-10, Tables 8, 9A, 9B, 10A, 10B, 10C, 11, 12A, and 12B; *see also* Comments of UPN at 23 ("Aside from its FCC license, an affiliation with a national network is a station's most valuable asset").

point out that affiliates have consented to affiliation agreements with their networks that contain onerous terms in order to maintain their affiliation.[7/] One commentator candidly noted that "the value of a network affiliation is substantial -- therefore, in the absence of safeguards, licensees would be more likely to compromise local, independent programming judgments than risk loss of their affiliation." *See* Comments of Lee Enterprises, Inc. at 4.

Loss of network affiliation is often devastating to stations. The *NERA Study* determined that the average affiliate of the four established networks has a larger cash flow margin than the average independent station. *See NERA Study* at 9. In some cases, as many commenters noted, loss of network affiliation may mean the demise of a station.[8/]

3. Current Contract Provisions in Affiliation Agreements

Under the current network-affiliate rules, the established networks have used their tremendous leverage to coerce affiliates into signing contracts that already most likely violate the right to reject rule. One could only imagine what provisions the networks would create if the Notice's proposal were to be adopted. How much further can the established networks "push the envelope" without completely undermining affiliates' ability to serve their local communities?[9/]

[7/] *See, e.g.,* Comments of Joint Parties at 4 ("Local stations' need for a network affiliation has not changed. As a consequence, networks have demanded, and affiliates have acceded to, network contract provisions which stretch (if they do not actually exceed) the network rules' current regulatory limits"); Comments of Sinclair at 9 ("The loss of a network affiliation...is a prospect that is genuinely feared by the affiliate. As a result, it is a tool by which a network can exercise enormous bargaining power over an affiliate").

[8/] *See* Comments of Sinclair at 8-9 ("Network affiliation is the crown jewel of a local television station -- the difference between success on one hand, and marginal performance or failure on the other . . . a station which loses its network affiliation is a station on the road to marginality, unprofitability, and possibly even extinction").

[9/] The Sinclair Broadcast Group, Inc. ("Sinclair") argues that the established networks already have immense bargaining power that they readily exercise to exact great concessions from their affiliates. *See* Comments of Sinclair at 13. Interestingly, one commentator, Pappas Stations Partnership ("Pappas"), has called

As the Joint Parties note, "[p]rovisions in contemporary network contracts already require affiliates to relinquish substantial programming and scheduling control to the networks and to reserve to networks the right to make programming and scheduling decisions which are rightfully (and legally) the responsibility of the licensee." Comments of Joint Parties at 17. The Joint Parties note that their affiliates often accept restrictive provisions in their affiliation contracts because they are afraid of offending their networks and losing profitable affiliations. For example, the Joint Parties cite network affiliation contract provisions of the established networks that: (1) place limits on the amount of affiliate preemption of network programming, (2) require written "justification" for preemption, (3) require affiliates to clear certain programs upon the expiration of other programming commitments, (4) require prior notice of preemption, and (5) obligate affiliates to carry all network programs. *See* Comments of Joint Parties at 5-6.

Blade Communications, Inc. ("Blade") comments that the network-affiliate relationship has become more adversarial in recent years. Blade asserts that affiliates have been forced by networks to accede to contract provisions which are of questionable legality even under current regulations. *See* Comments of Blade at 6. For instance, the Fox network has inserted a provision in its contracts that grants it the right to terminate the affiliation if affiliates make "unauthorized" preemptions three or more times in a year. *See* Fox Broadcasting Company Station Affiliation Agreement, Exhibit B. Similarly, ABC affiliation contracts penalize affiliates for exceeding specified permissible levels of preemption. Comments of Joint Parties at 7.

NBC has required certain of its affiliates to sign a provision that the affiliate "does not foresee any need" to preempt any NBC programming except when circumstances require

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on the Commission to "look more closely at the current agreements that are being entered into between the networks and affiliates to ensure itself that the envelope has not already been pushed open." Comments of Pappas at 4; *see also* Comments of Joint Parties at 15 ("the network contract provisions . . . which are now demanded by networks already push the envelope of permissible restrictions").

live coverage of local news events. *See* NBC TV Network Agreement, Exhibit C. When an NBC affiliate makes an "unauthorized preemption," the station is liable to NBC for lost network advertising revenues. *Id.*

Fox pioneered the technique of limiting the preemption rights of affiliates to only "fast-breaking news events." Stations risk losing their affiliations by broadcasting local sports, local political debates, charity telethons, and even non-news public affairs shows. NBC and Fox affiliates must acknowledge that no network programming is unsatisfactory, unsuitable, or contrary to the public interest unless it "differs substantially" from network programs previously broadcast by that station, is delivered in a form which does not meet accepted engineering standards, or the prevailing standards of good taste in its community of license have changed. *See* Fox Broadcasting Company Station Affiliation Agreement, Exhibit B at 12; NBC TV Network Agreement, Exhibit C at 5. Such a standard for acceptable preemptions is so high as to prevent almost all preemptions from being considered permissible.

Both NBC and Fox contracts restrictively define the type of programming that an affiliate can deem to be unsatisfactory or unsuitable. Both contracts require written prior notice of preemption. Preemptions to air local sporting events are forbidden, as are preemptions to broadcast programming that is more profitable or more attractive to the station or its local audience.

Sinclair notes that, contrary to the principle of localism that broadcast regulation has traditionally attempted to foster, networks readily exercise their leverage to (1) demand affiliate commitments of up to ten years, (2) require that affiliates clear network-developed programming in previously non-network day-parts, and (3) impose large monetary penalties and/or loss of affiliation on their affiliates for preemption of network programming. *See* Comments of Sinclair at 6. According to the Joint Parties, networks have formulated these draconian contract provisions to manipulate affiliates into becoming virtually open channels through which network programming may flow unimpeded by serious review. *See* Comments of Joint Parties at 18. As MAP notes, the fact that affiliates submit to such harsh penalty clauses is a clear sign that networks still have an advantage in bargaining with their affiliates. *See* Comments of MAP at 8. As Blade notes, "[t]hese are not provisions imposed by networks which are at the mercy of their affiliates. Rather, they reflect the networks' continuing ability and desire to control significant details of their affiliates' operations." Comments of Blade at 9.

4. Network compensation

The established networks consider the recent increase in affiliate compensation to be evidence of greater affiliate bargaining power. Contrary to assertions made by the established networks and in the Notice, however, network compensation, on average, was only slightly higher in 1993 than it was in 1980. Moreover, network compensation in 1993 was actually *40 percent lower* than in 1980 after adjusting for inflation. Even before adjusting for inflation, the typical affiliate had lower compensation in 1993 than in 1980. *See NERA Study* at 10-11, Table 13. Additionally, the *NERA Study* notes that even increases of $100 to $200 million that the established networks claim were the result of the recent affiliation realignments would not place affiliates in a better position today than in 1980 after accounting for inflation. *See NERA Study* at 10.

Compensation levels are related to the number of independent stations present in a market; the average network compensation per television household is lower in larger markets with more independent stations. Thus, compensation levels are closely tied to the number of viable alternative stations to which the networks might turn. *See id.* at 11 and Table 14.

In its comments, CBS argues that the network-affiliate rules should be repealed because the three established networks are coming under increasing competitive pressure, resulting in a decline in their market share for audiences and in advertising revenues. As

MAP notes, it is even more important to protect local station revenues than it is to protect network revenues, as stations are the parties obligated to serve the public interest. Additionally, it is clear from the *NERA Study* data that affiliates are less well off relative to their networks, as measured by revenue, due to changes in the video marketplace: between 1980 and 1993, the profits of the three major networks increased more than the profits of the typical affiliate. *See id.* at 11 and Table 15.

5. Group ownership of stations

The percentage of group-owned stations declined between 1981 and 1994. *See id.* at 6 and Table 5. This finding by NERA directly contradicts the Notice's assumption that there has been a trend toward group ownership which has leveled bargaining power between networks and affiliates. Moreover, as Sinclair notes, even group ownership of affiliated stations does not prevent network termination of an affiliation.[10]

Although there has been only a slight increase in coverage by the major nonnetwork group owners,[11] those owners generally have stations with a variety of affiliations, resulting in reduced bargaining advantage in negotiations with any one particular network.[12] Conversely, there has been an increase in group ownership by the networks,[13] a trend that

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[10] *See* Comments of Sinclair at 10 ("Sinclair's experience [of nearly losing a network affiliation] is an example not only of the fact that networks will terminate affiliations, but of the fact that group ownership of television stations does little to diminish that threat" (emphasis in original)).

[11] *See NERA Study* at 6 and Table 6.

[12] One commentator considered the Notice's suggestion that the "trend toward group ownership" has boosted affiliates' bargaining position to be exaggerated. MAP contends that the Notice's statistic is overstated because it includes small group owners -- those holding only two or three licenses -- that do not necessarily enjoy significant bargaining power with their networks. Additionally, MAP notes, in 1994, almost one-third of all stations (370 out of 1154) were owned by single license holders. *See* Comments of MAP at 2, n. 1.

[13] *See NERA Study* at 6.

will accelerate when Westinghouse acquires CBS and when, as expected, ownership caps are raised.

6. The growth of cable and other nonbroadcast outlets

The growth of cable has adversely affected networks and affiliates, but networks remain the largest share category. Cable has eaten into the share of both network and nonnetwork programming, doubly affecting affiliates. Also, as the *NERA Study* notes, cable has the potential of harming affiliates because it serves as an alternate distributor of network programming for the Fox Network, and possibly Warner Brothers in the future. *See NERA Study* at 7-8, Tables 7 and 8.

With the increase in the number of independent stations and other video outlets, affiliate stations will lose bargaining leverage with their networks. As INTV notes, the increase in alternative outlets for network programming will contribute to the willingness of networks to bypass their affiliates in distributing their programs. *See* Comments of INTV at 7-8. INTV points out that with the recent proposed Disney/ABC and Westinghouse/CBS combinations, all three established networks now have significant ownership or long-term revenue sharing interests in cable channels. *Id.* at 7, n. 11. This substitution of cable and non-broadcast outlets for broadcast stations is not adequate to serve the needs of local communities, because only broadcast stations provide uniquely local programming.

7. Recent Affiliation Realignments

Several established networks have asserted that the networks do not have market power over their affiliates. To support this assertion, they point to the large number of affiliation realignments in the past year. As INTV notes, and even NBC recognizes, however, the affiliation realignments were the result of the Fox Network's desire for more attractive VHF affiliates. *See* Comments of INTV at 3; Comments of NBC at 11-12. Such shifts in affiliations did *not* represent increased affiliate power. Although some affiliates received greater compensation as a result of the shifts, many had to submit to longer term affiliations with more onerous contract provisions in return for the additional income. *See* Comments of INTV at 3-4.

B. THE NERA ECONOMIC STUDY EFFECTIVELY REFUTES THE NETWORKS' CLAIM THAT NETWORKS HAVE REDUCED BARGAINING LEVERAGE AGAINST THEIR AFFILIATES.

The networks claim that affiliates have gained substantial bargaining power in recent years in their relationships with the networks. In fact, NBC makes the incredible assertion that the network-affiliate rules are no longer necessary because networks and affiliates now stand as equal partners. *See* Comments of NBC at 1. This claim is based on empty argument and is not supported by the facts. From its economic study of the network-affiliate relationship, NERA concludes that the balance of power in that relationship has not tipped in favor of affiliates in recent years. As the *NERA Study* indicates, since 1980, network compensation to affiliates has not increased in real terms, the profits of affiliates have not increased relative to networks, and clearance rates have not decreased.[14/]

The *NERA Study* concludes that since 1980, when the last comprehensive review of the network-affiliate relationship took place, the changes in market conditions have not tended to favor affiliates in their negotiations with networks. Consequently, although new networks and stations have recently entered the market, cable television has grown, and syndicated programming has improved, none of these things have led to increased bargaining power on behalf of affiliates or have diminished the attractiveness of network affiliation for television stations. *See id.* at 12.

[14/] To evaluate the relative bargaining power of networks and affiliates, NERA focused on several factors including: (1) the number of networks and broadcast stations; (2) group owners; (3) cable television; and (4) the attractiveness of affiliation. Additionally, NERA evaluated network compensation, network and affiliate profits, and the prevalence of affiliate clearance of network programs. *See NERA Study* at 3.

C. The Affiliate and New Network Comments Confirm the Continued Dominance of the Established Networks in the Broadcasting Market.

CBS makes the astonishing contention that it is doubtful that networks ever had dominant power over their affiliates to pressure stations into clearing network programming. *See* Comments of CBS at iii. This assertion is belied not only by the Chain Broadcasting Report, but also by the just-filed comments of many affiliate groups and broadcasters. In fact, a unifying concern in all of the comments submitted, other than those of the three established networks, was the growing network dominance over affiliates and new networks in the current video marketplace. Affiliate commenters noted that networks often are aggressive or hostile to their affiliates, exploiting their leverage under the existing network-affiliate rules to wrest control over scheduling and programming away from affiliates.[15]

In its comments, Viacom outlined the recent economic and regulatory changes that have already hindered the ability of new networks to compete for affiliates and audiences. According to Viacom, established networks have begun: (1) solidifying their influence over affiliates and increasing program clearances by acquiring equity interest in their affiliates; (2) binding their affiliates to long term affiliation contracts; and (3) buying affiliate loyalties with preferential distribution of in-house produced programming and independent programming. *See* Comments of Viacom at 3-6. Viacom asserts that these changes have increased network managerial control over their affiliates' decisions. Moreover, Viacom agrees with NASA's view that repeal of various regulatory protections such as the

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[15] *See, e.g.,* Comments of INTV ("Networks' relationship with their affiliates has changed from one of mutual cooperation to one in which the networks are aggressive and even hostile in dealing with individual stations"); Comments of Blade at 11 ("Even if stations have theoretical rights under Commission rules, the networks have the ability and the incentive to subvert those purported rights in practice. The networks now push current rules to or even beyond their limits").

syndication rules and the Prime Time Access Rule will further extend network programming leverage over affiliates. *See id.* at 7.

II. CONTRARY TO THE ASSERTIONS OF THE ESTABLISHED NETWORKS, THE NETWORK-AFFILIATE RULES HAVE PRESERVED LOCAL STATION AUTONOMY, PROMOTED COMPETITION, AND FOSTERED PROGRAM DIVERSITY WITH MINIMAL INTRUSION ON THE NETWORK-AFFILIATE RELATIONSHIP.

A. THE RIGHT TO REJECT RULE IS THE CORNERSTONE PROTECTION OF LOCAL STATION EDITORIAL DISCRETION AND MUST NOT BE EVISCERATED BY UNWORKABLE PROPOSALS.

The comments overwhelmingly recognized that the right to reject rule is the primary tool by which local stations maintain control over their scheduling and programming. Without the right to reject rule in its present form, local stations would be subject to coercion by the networks to broadcast network programming almost universally.

The established networks vary in the degree of their support for the modification and/or elimination of the right to reject rule. For example, ABC supports the Commission's proposal to eliminate financial concerns as the sole factor in the decision of an affiliate to reject network programming. ABC contends that all other network-affiliate rules are anticompetitive. Consequently, ABC asserts that only a modified right to reject rule is necessary, in combination with existing antitrust enforcement standards, to protect affiliate programming discretion and to promote the development of new networks.[16]

CBS goes further in its support of the Commission's existing proposal by arguing for imposition of a greater limitation on the right to reject rule to prevent affiliate preemption

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[16] The antitrust laws and the Communications Act of 1934 are meant to further separate, but complementary, goals -- the Communications Act does more than just safeguard competition, it serves the public interest by promoting diversity of programming, station autonomy, and localism. The Communications Act of 1934 designates the individual licensee as a "trustee" of the public interest, with an obligation to ensure that programming is suitable for the needs and mores of its community of license.

of network programming to broadcast local sporting events or entertainment programs.[17] CBS focuses on the detrimental effect that preemptions have on the ability of networks to produce expensive programming.[18] CBS's proposal seems to be motivated by its belief that most decisions by affiliates to preempt network programming are economically driven. CBS notes that its proposal will merely allow networks to negotiate contracts with their affiliates limiting preemptions, but will not guarantee that networks will obtain such provisions.

NBC goes to the radical extreme of advocating total repeal of the right to reject rule. NBC asserts that the rule should be repealed for the following three reasons: (1) the principle that licensees retain ultimate responsibility for their programming is respected and accepted by all, a proposition that is difficult to reconcile with NBC's own practices;[19] (2) there is no relevant difference between radio broadcasters and television licensees, yet radio licensees have not been regulated by this rule for twenty years, with no resulting public harm, a claim that ignores the dramatic differences between the pervasive influence of television networks as compared to much weaker radio networks; and (3) the competitive marketplace precludes networks from controlling their affiliate's programming decisions, thereby eliminating the need for a rule that applies only to networks, an argument that ignores the basic reality of the network-affiliate relationship.

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[17] As mentioned earlier, NBC and Fox already preclude their affiliates from preempting network programming to broadcast local sports programs. Such preemptions are simply "unauthorized," a contract provision that cannot be rationally squared with the Commission's rules.

[18] MAP notes, however, that even without the Notice's proposed limitation on the right to reject rule, network revenues are higher than ever before. *See* Comments of MAP at 5.

[19] NBC's current affiliation agreement appears to be more restrictive than even what is permissible under the current right to reject rule. In its affiliation agreement that some affiliates have executed, NBC gives affiliates the right to preempt network programming only if a station believes that the programming would be unsuitable for the local community or if the station wishes to broadcast local news. NBC does not appear to have a provision allowing preemptions for other types of programs.

NBC contends that networks would not try to impose unsuitable material upon their affiliates. Networks, however, can and do present affiliates with material that is unsuitable for some local audiences. For example, a station owned by the Holston Valley Broadcasting Corporation ("Holston") refused to broadcast ABC's controversial series, NYPD Blue, during its first season because the station objected to the sexually explicit content of the program. As a result of Holston's preemption, and that of nearly 40 other stations nationwide, ABC responded, and during the second season, limited sexually oriented scenes. Virtually all ABC affiliates carried the series in its second year. Holston asserts, therefore, that the ability to reject network programming enabled it to send an important message to the network. *See* Comments of Holston at 2. Moreover, Holston's example demonstrates the great need for local station review of network material as a protective "check" to safeguard the "good taste" standards of local communities.

Affiliate commenters rejected the premise that any modification of the right to reject rule was necessary. They point to the nearly 98% clearance rate of all network prime time programs by local affiliated stations as evidence that affiliates are not preempting network programs recklessly.[20] Additionally, as we noted in our comments, the Chain Broadcasting Report indicates that when these rules were devised, there was no limitation on the reasons for rejection of network programming. Many commenters fear that precluding stations from making economically based preemption decisions would chill editorial discretion and give networks a harassing tool to coerce stations into avoiding preemptions (and possibly forsaking their public obligations). *See* Comments of INTV at 13. Local audiences would

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[20] *See* Comments of INTV at 13; Comments of the Chief Counsel for Advocacy of the United States Small Business Administration ("SBA") at 11 ("network clearances are at their highest levels ever, approaching 98 percent. The [SBA] fails to understand why the Commission would modify this rule to obtain that extra 2 percent clearance"); *see also* Comments of Holston Valley at 1 ("in the interest of maintaining a positive relationship with its network, in practice[,] a local affiliate is not going to precipitously reject that network's programming").

be deprived of popular local programs just because they may be more profitable than those presented by the networks. Additionally, some commenters noted that rejection decisions which are financially-based may serve the public interest by securing funds for the costly production of public interest programs.[21]

The Notice's proposal would greatly impair the independence of station programming decisions. For example, WTOC-TV, a CBS-affiliated station of the AFLAC Broadcast Group, Inc. ("AFLAC") in Savannah, Georgia, regularly delays the David Letterman show for one-half hour on Friday nights in order to broadcast a local high school sports program. The sports program is more profitable than the David Letterman program, but it is also a program that is highly demanded in the community.[22] The station has been commended for keeping teens off the streets on Friday nights because local high school students leave the games and return home to watch the sports program. The CBS affiliate has resisted repeated attempts by the network to clear the time for the Letterman show to be broadcast live. *See* Comments of AFLAC at 5-6. If the Notice's proposal is adopted, that station's decision to broadcast a local sports program will not be protected. As mentioned earlier, CBS, in its comments, argues strenuously that affiliates should be forbidden the right to preempt network programming in order to broadcast local sporting events. Consequently, the community served by WTOC-TV would be deprived of a valuable public oriented program. AFLAC notes that WTOC-TV has been able to resist considerable pressure to

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[21] *See* Comments of Chronicle Broadcasting Company, LIN Television Corporation, Midwest Television, Inc., The Providence Journal Company, and Spartan Communications, Inc. (the "Joint Commentators") at 3; *see also* Comments of MAP at 4 ("a station's decision to reject network programming for financial reasons is ultimately and insep[a]rably linked with the public interest. It may, for example, result in added revenues for the station's news and public affairs programming").

[22] As SBA noted, "a program with greater local public interest also may generate higher ratings." Comments of SBA at 8.